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No. 00-1240

IN THE

Supreme Court of the United States

TRI-STATE COACH LINES, INC., on behalf of itself and others similarly situated, SAM VAN GALDER, INC., on behalf of itself and others similarly situated, ADVANTAGE LIMOUSINE, INC., on behalf of itself and others similarly situated,

Petitioners,

v.

METROPOLITAN PIER AND EXPOSITION AUTHORITY, a body politic and municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners refer the Court to page ii of the Petition.

The Metropolitan Pier and Exposition Authority ("MPEA") misapprehends the reliance petitioners place on this court's decision in *Aloha Airlines v. Director of Taxation,* 464 U.S. 7 (1983). The petitioners do not contend that the case presents precisely the same issue, as different statutes are at issue. Rather, petitioners contend that the Appellate Court's restrictive interpretation of the section 14505(2) preemption language conflicts with this Court's interpretation of virtually identical express preemption language at issue in *Aloha Airlines*. The only distinction is that in *Aloha Airlines* the preemption before the Court addressed air commerce rather than ground transportation. Virtually identical language employed by Congress in two different statutes should not be construed to achieve contrary results.

To support its contention that the decision below does did not conflict "with a decision of this or any other court," the MPEA relies on *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994); *Kamikawa v. United Parcel Serv., Inc.*, 966 P.2d 648, 652 (Haw. 1998), and *Kamikawa v. Lynden Air Freight, Inc.*, 968 P.2d 653 (Haw. 1998), *cert. denied*, 526 U.S. 1087 (1999). (Brief in Opp. p. 11). According to the MPEA, those cases demonstrate that the Appellate Court decision is consistent with *Aloha Airlines*.

However, those cases support petitioners here. In *Northwest Airlines*, this Court construed the scope of the statutory provisions contained in the federal Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513(b) [now codified as 49 U.S.C. § 40116(b)], which prohibits states and political subdivisions from levying a "fee" or "other charge directly or indirectly" on "persons traveling in air commerce or on the carriage of persons traveling in air commerce." The AHTA, unlike the ICCTA at issue here, contains a savings clause which is an exception to the express preemption otherwise provided. The savings clause declares that "nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an

airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. § 1513(b) [now codified as 49 U.S.C. § 40116(b)]. Congress chose not to include any savings clause in section 14505 of the ICCTA, and *Northwest Airlines* therefore supports petitioners' argument, not the MPEA's. In this case, the Appellate Court judicially created the savings clause.[1]

The two state court cases, *Kamikawa v. United Parcel Serv., Inc.*, 966 P.2d 648 (Haw. 1998) and *Kamikawa v. Lynden Air Freight, Inc.*, 968 P.2d 653, (Haw. 1998), *cert. denied*, 526 U.S. 1087 (1999), are irrelevant. Both cases hold that the federal preemption of state taxation of gross revenues from air commerce does not extend to ground transportation. Here, the ICCTA preemption clearly focuses on interstate ground transportation only. Neither of the *Kamikawa* cases has anything to do with the issue addressed in *Aloha* and raised by petitioners. *See Kamikawa v. Lynden Air Freight, Inc.*, 968 P.2d 653, 657 (Haw. 1998) ("We, therefore, reject Lynden's characterization of the present action as an attempt to "unjustly force[] Lynden to litigate the same issue [raised in Aloha Airlines]."

This Court's opinion in *Aloha Airlines* is pertinent to the question presented here, and the Appellate Court opinion conflicts with its jurisprudence. In the Appellate Court, the petitioners relied heavily on *Aloha Airlines*. Rather than accepting the MPEA's invitation to distinguish *Aloha Airlines*, the Appellate Court ignored it.

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1. If Congress had enacted a similar savings clause in section 14505 of the ICCTA, the Airport Departure Tax would not qualify to invoke it. The Airport Departure Tax is an occupation tax levied on those who provide for-hire ground transportation from the airports, not a user fee. (*See* MPEA Airport Departure Tax Ordinance 1-3: "There is hereby imposed an occupation tax . . .") Moreover, the MPEA neither owns nor operates the Chicago airports.

The MPEA strains to avoid the import of many of the cases cited by petitioners that construe the term "interstate commerce" by arguing that most (but admittedly not all) of those cases concerned the reach of the dormant Commerce Clause. (Brief in Opp. p. 13). Their argument amounts to a distinction without a difference. It is beyond dispute that the term "interstate commerce" has acquired a settled judicial meaning, and it must be presumed Congress employed that meaning when it used the term in a statute. *See, e.g., United States v. Merriam*, 263 U.S. 179, 187 (1923). It is irrelevant whether the decisions imparting that meaning involved constitutional or statutory issues.

The MPEA admits that *Airline Transportation, Inc. v. Tobin*, 98 F.2d 249 (4th Cir. 1952), concerned the meaning of interstate commerce when used in a statute, but the MPEA attempts to distinguish *Tobin*, because the transportation involved was pursuant to a contract with the airline. (Brief in Opp. p. 13). The alleged distinction does not assist the MPEA, because the plaintiff classes include motor carriers that provide ground transportation pursuant to contracts with airlines for through ticketing or excursions.

To support its contention that the Appellate Court's restrictive construction of section 14505(2) is "a routine application of federal preemption principles," the MPEA cites *United States v. Yellow Cab Co.*, 332 U.S. 218, 231, and other cases holding that local taxicab service is not an integral part of interstate transportation. (Brief in Opp. p. 14). The MPEA's reliance on those cases only confuses the issue. Neither of the plaintiff classes includes local taxicab operators. The plaintiffs provide service only through special arrangements; they do not participate in the taxicab trade at the airports.

The MPEA also misrepresents the holding in *Yellow Cab*. It is true that this Court held in *Yellow Cab* that local taxicab service conveying interstate train passengers between the

railroad station and their homes did not constitute interstate commerce, because the link between the train trip and the passenger's subsequent election to walk outside the station to hail a cab was too attenuated. However, the MPEA ignores the portion of the *Yellow Cab* decision holding that local transportation provided pursuant to prearrangement constituted interstate commerce. This Court also suggested in *Yellow Cab* that other arrangements, e.g., cabs serving only railroad passengers, or fares paid and collected as part of railroad fares, might also be considered transportation of passengers traveling in interstate commerce. *Id.* at 231.

There is no basis for the MPEA's argument that using prearrangement as a criterion for transportation exempt from state taxation is unworkable. (Brief in Opp. p. 15). As the cases reflect, prearrangement has been used as a criterion in other contexts without apparent difficulty. In any event, any burden would fall upon the petitioners to prove their right to appropriate remedies.

The MPEA repeats the conclusion of the Appellate Court that the tax here is not on transportation, but only on "departures." (Brief in Opp. p. 15). This is a semantic argument with no substance, akin to the argument that the State of Hawaii made and that this Court rejected in *Aloha Airlines*. The MPEA has no right to charge the petitioners for departing a facility that the MPEA neither owns nor operates. Moreover, the Illinois General Assembly authorized the MPEA to impose only an occupation tax, not a toll. The occupation tax is not imposed on every vehicle using or departing the airports, but only on transportation companies when they are transporting passengers for hire. Moreover, the amount of the tax varies based upon the passenger capacity of the vehicles or the number of passengers carried.

Finally, to support its argument that in section 13501 of the ICCTA (the chapter that defines the Surface Transportation Board's regulatory jurisdiction) Congress restricted the breadth

of the section 14505(2) preemption, the MPEA improperly characterizes this Court's holding in *Wardair Canada v. Florida Department of Revenue*, 477 U.S. 1 (1986). The MPEA describes this Court's holding as "recognizing that the power to tax is coextensive with the power to regulate." (Brief in Opp. p. 17 n.4). The Court did not say that, either expressly or impliedly.

In *Wardair,* this Court held that the Federal Aviation Act, 49 U.S.C. App. § 1301, *et seq.* (1982 ed. and Supp. II), did not prohibit Florida from taxing the sale of airline fuel, because "not only is there no indication Congress wished to preclude state sales taxation of airline fuel, but, to the contrary, the Act expressly permits States to impose such taxes." *Id.* at 6. In so ruling, this Court noted that the Federal Aviation Act, unlike section 14505 of the ICCTA, specified the kinds of taxes, including "taxes on the sale of goods or services," that are permissible. Thus, as in the *Northwest Airlines* decision discussed previously, the plain language of the statute in question expressly permitted the tax at issue.

Similarly, the MPEA's reliance on *Buck v. California*, 343 U.S. 99 (1952) is misplaced. This Court did not hold in *Buck* that the authority Congress gave to California to regulate ground transportation also served to define California's authority to tax. *Buck* involves California's authority to regulate the qualifications of taxicab operators and to charge a $1 fee for a driver's permit. *Buck* did not address California's right to contravene a statute expressly preempting its ability to tax.

Since the arguments the MPEA presents in its opposing brief distort the question presented, rely on irrelevant case law, fail to recognize the petitioners' actual role at the airports, and misstates the holdings of this Court, the need for plenary review of the decision below is indisputable.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioners respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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